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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

LINDA ARMSTRONG,

Plaintiff and Appellant,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA
et al.,

Defendants and Respondents.

C044192

(Super. Ct. No.
01AS03768)

Plaintiff Linda Armstrong appeals the summary judgment entered in favor of defendants Barbara Ross and the Regents of the University of California (University) on Armstrong's complaint for, inter alia, wrongful termination in violation of public policy, race discrimination, and retaliation in violation

of Health and Safety Code section 1278.5.¹

In 1999, Armstrong, an African-American, was employed by the University of California Davis Health System. At that time, she supervised the Patient Relations Unit, a unit that received, investigated, and resolved patient complaints regarding the service provider or the health service plan. In March 1999, Armstrong began complaining to her superiors that her unit was "out of compliance" with its contractual obligation to process and resolve patient complaints within 30 days. Shortly afterwards, Armstrong's relationship with Ross, also African-American and Armstrong's supervisor, began to deteriorate, and Ross gave Armstrong a lower score on her performance evaluation than she had in years past.

During this same time, the University was experiencing severe budget shortfalls and began implementing cost cutting measures, which included the reorganization of a number of units and departments and the elimination of 300 positions throughout the system. The Patient Relations Unit was one of those units. In an effort to increase efficiency and customer satisfaction, Martha Marsh, the new hospital director, decided to reorganize the patient complaint process by decentralizing it, abolishing the Patient Relations Unit, and creating a new department to handle the complaints. As part of the fallout of those changes,

¹ All further section references are to the Health and Safety Code unless otherwise specified.

Armstrong's position was eliminated and she and the other permanent employees in her unit were notified that they faced possible layoff. Rather than take a position in the new unit at a lower classification, Armstrong secured a time limited training position in a different department, under different managers, and at her same classification and salary. She found the work interesting, performed well, and got along well with her supervisors. Nevertheless, about six months later and before her training position terminated, Armstrong submitted a letter of resignation stating she had obtained a job outside the University.

Armstrong filed suit against the University and Ross, alleging that she was constructively discharged from her position as supervisor of the Patient Relations Unit, Ross had embarked on a campaign of harassment and racial discrimination against her culminating in the reorganization of Armstrong's unit and the elimination of her position, that these acts were racially motivated and in retaliation for her complaints that her unit was out of compliance with the 30-day resolution requirement.

On appeal, Armstrong contends the trial court erred in granting summary judgment because (1) she raised triable issues of fact on her claims of constructive discharge and race discrimination, (2) proof of constructive termination is not an element of a retaliation claim under section 1278.5, (3) the trial court failed to apply the rebuttable presumption of

retaliation required by section 1278.5, and (4) section 1278.5 applies to individuals as well as health facilities. We find no error and shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND²

A. Armstrong's Employment History with the University

Linda Armstrong, an African-American, was hired by the University of California Davis Health System (UCDHS) in 1988 or 1989 for a temporary position in the Community Services Department. Barbara Ross, also an African-American, was the manager of that department and Armstrong's supervisor.

Over the following eight years and with Ross's assistance, Armstrong advanced in the UCDHS from her original temporary position as an Administrative Assistant I to a permanent position with a classification that steadily increased from Administrative Assistant II and III Supervisor to the professional classifications of Analyst II and Analyst III. Along the way, Armstrong received the accompanying pay increases, as well as several equity stipends, which were

² This appeal is from an adverse judgment entered after a motion for summary judgment in favor of defendants. On review of a summary judgment, we set forth the undisputed facts and those facts alleged by plaintiff which are supported by the evidence properly considered by the trial court and the reasonable inferences that can be drawn from that evidence. (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 57.) Applying this standard, we have omitted those facts alleged by plaintiff which are not supported by admissible evidence or that may not be reasonably inferred from that evidence.

granted when her responsibilities exceeded her classification. She also received all merit increases. Because Ross was Armstrong's supervisor during most of this time, she prepared most of her performance evaluations, each time rating her "outstanding," with an occasional "very good" in an individual category.

Meanwhile, in 1996, Armstrong began working in the Patient Relations Unit (PRU), which reported to Ross, who was under the direction of Dr. Shelton Duruisseau, Senior Associate Director of the UCDHS. Dr. Duruisseau is African American. In June 1996, Ross placed Armstrong in an acting Administrative Analyst position and obtained a 15 percent pay increase for her. In 1997, Ross appointed Armstrong into an Analyst II position, and shortly afterwards, appointed her as the supervisor of the PRU.

The PRU was responsible for receiving, investigating, and resolving patient complaints, as well as providing monthly and quarterly reports of patient complaints to several health plans and the University's Quality Care Committee.

Health care service plans are required by statute and regulation to establish and maintain a grievance system that tracks and monitors patient complaints regarding the plan or the provider and resolves them within 30 days. (§§ 1368, subd. (a)(1), 1368.01; Cal. Code Regs., tit. 28, § 1300.68(a)(1) and (e)(1).) This requirement may be delegated by contract. (Cal. Code Regs., tit. 28, § 1300.68(e).)

Western Health Advantage, a third party payor that

compensates the UCDHS for services provided to patients, delegated to the UCDHS its duty to process patient grievances within 30 days. The PRU was responsible for processing those grievances. Compliance with this 30-day resolution requirement was assessed by the Department of Health Services which performed audits for Western Health Advantage. In the event the UCDHS failed to meet the 30-day turnaround period or failed to make the required monthly reports, a corrective action plan could be established.

In 1997 the Department of Health Services conducted such an audit and found the UCDHS was in "minimal compliance" with the 30-day turnaround requirement. No finding of a violation of state or federal law was found and no fines were imposed. However, Dr. Allan Siefkin, Associate Director of the Clinical Affairs Division, sent a memorandum to Duruisseau, which warned that "[b]ecause we may be in jeopardy of losing revenue due to minimal compliance of the Patient Relations function, it is imperative that action be taken to bolster the obligations set forth in the payor contracts." Siefkin directed Duruisseau to "provide an action plan to correct this situation as soon as possible." Duruisseau did so, directing Ross and the PRU staff to correct the areas that needed improvement, and a number of changes were made.

In July 1998, Armstrong received a performance evaluation prepared by Ross, which gave her an overall rating of "outstanding" and credited her with providing guidance and

leadership and helping to resolve patient complaints "expeditiously."

B. Armstrong's Complaints

In early March 1999, Armstrong advised Ross that the PRU was "out of compliance" because it could not process patient complaints within the 30-day period. Later that month, while Armstrong was attending the Black Administrator's Council Conference, she told Duruisseau that her unit was out of compliance with the 30-day requirement and that she needed more staff. When he advised her to work it out with Ross, she told him she had informed Ross about the problem, but no action was taken.

After returning from the conference, Armstrong's relationship with Ross became strained. Ross accused her of attending the conference without proper approval despite the fact she had a note from Duruisseau indicating he knew she would be attending the meeting.

On May 21st, Armstrong sent an e-mail to Ross, again advising her that the PRU was out of compliance with the 30-day requirement on approximately 30 percent of the Western Health Advantage and governmental cases. She characterized the non-compliance problem as a "staffing issue" because the volume of calls had "gone through the roof." She offered three possible solutions involving the addition of another permanent full time staff person, increasing the two part-time employees to full

time status, or maintaining the status quo, which she advised against.

Upon receiving this e-mail, Ross notified Duruisseau of Armstrong's concerns. A few days later on May 24th, she sent Armstrong an e-mail in which she advised her that she had spoken to Duruisseau and "expressed our concerns as well as your message about the increasing number of complaints and requests for reports." Seeking Armstrong's input, Ross posed a number of questions and a proposed resolution of the staffing problem, and suggested that Armstrong see whether employee Penny Marston was available to assist them. Ross approved an increase in hours for two part-time employees through June 30, 1999, and at Armstrong's request, agreed to seek budgetary approval for the increase through August 1999.

On May 25th, Duruisseau, Ross, and Armstrong met again to discuss the compliance problems in the PRU. Duruisseau did not think the unit was "out of compliance" and did not want that term used, although he did think the unit needed more staff. Consequently, Armstrong was directed not to use the phrase "out of compliance," because it raised concerns addressed in Dr. Siefkin's 1997 memorandum.

Around this same time, Ross informed Armstrong she would no longer meet with her unless someone else was present. Before that time, they would have regular meetings on a variety of departmental issues.

In July, Armstrong reported her concern about the PRU's

lack of compliance with the 30-day turnaround requirement to the Hospital Operations Committee. She attributed the problem to an increasing number of complaints and a lack of adequate staff.

About the same time, Ross contacted Ron Gordon, manager of Employee and Labor Relations, seeking his advice about managing Armstrong because she was not meeting Ross's expectations. Gordon had previously supervised Armstrong.

On July 13th, an anonymous complaint was sent to Gloria Alvarado, Assistant Director of Human Resources and Risk Management, claiming Armstrong was not adhering to regular work hours and was therefore abusing University resources. An investigation was conducted but the findings were inconclusive.

At the end of July, Armstrong met with Duruisseau and Ross to discuss her proposal to hire someone to fill a temporary position. They approved her proposal, although Armstrong questioned why Ross would not allow her to recruit for another career position.

Following this meeting, Ross advised Armstrong her performance had deteriorated to an unacceptable level and she had become defensive. She told Armstrong that when she was out of the office at committee meetings, the staff wondered where she was, and directed Armstrong to obtain her prior approval before participating in committee meetings, and to notify her each time she left the office for any reason.

On August 6th, Ross presented Armstrong with her 1999 annual performance evaluation, in which she downgraded her

overall rating to "very good." The evaluation reviewed her accomplishments and weaknesses, acknowledged the PRU had received a compliance score of "significant compliance," a marked improvement from the 1997 audit, and indicated that the number of patient complaints had increased in the last year by over 40 percent. However, Ross indicated that although she had approved additional staff, the unit was still behind in completing its work. Ross summarized her directions to Armstrong, which included limiting all additional projects and committee work that would take her out of the office without Ross's prior approval until Ross was confident the work of the unit was completed in a timely manner. The evaluation concludes with the statement that Armstrong "contributes significantly to the dedicated work of the Patient Relations unit."

On August 17th, Armstrong met with Gordon to advise him of the workload problem in her unit and to express her concern about her relationship with Ross. She explained that Ross was not allowing her to participate in external activities and she was not getting the level of support she needed in view of the excessive patient complaint level and inadequate staffing.

In September, Armstrong also met with Alvarado to express her concerns and frustrations with the workload and understaffing problems. She believed Ross was not providing her with enough support, thereby making her job very difficult.

In November, Ross wrote a note to Armstrong's file, in which she described Armstrong as a problem employee with

"attitudinal problems."

C. Reorganization of the Patient Relations Unit

Meanwhile, the UCDHS was undergoing severe budget constraints in 1999. Martha Marsh, the new hospital director, ordered that no non-essential overtime be allowed. The budget constraints became even more severe in the fall causing Marsh to issue a memorandum advising staff that expenditures would be restricted and cost cutting measures would be taken. These included staff lay-offs, the limitation on new positions to those that directly impacted patient safety, reorganizations and decreases in staffing levels throughout the UCDHS, and the elimination of approximately 300 positions. Many departments and units were forced to get along with fewer staff under difficult circumstances and many of the employees whose positions were eliminated took demotions to lower classifications so they could retain their employment with the University.

Concerned about the mounting problems in the PRU and her deteriorating relationship with Armstrong, Ross conceived a plan to restructure the unit to more effectively handle the increasing workload. Under her plan, the PRU and the Interpreting Services unit would be consolidated and Armstrong would no longer report to her. Ross spoke to both Gordon and Alvarado about her plan. Gordon warned her that Armstrong might see the consolidation differently, but Alvarado directed her to put the proposal together and speak to Duruisseau, which she

did.

Ross advised Duruisseau of her plan and also told him "since the 10/7 memo went out, Linda has made herself a 'victim' and believes I will lay her off. This is NOT my intent." She informed him that Gordon wanted her to "be more aggressive in managing [Armstrong] to stop some of her continuous whining about being a victim" and suggested she not meet with Armstrong individually, but continue to have regular staff meetings with all three managers together, as she had done since July.

Meanwhile, Armstrong continued to press the issue of understaffing and on November 4th, Ross approved a temporary employee position through February 29, 2000.

At this same time, Marsh's office was receiving an increasing number of unresolved patient complaints. Because of the rising volume of complaints and patient anger, Marsh concluded the PRU was not being responsive to the complaints and that a change was required. She spoke to Bob Chason and Alvarado about the escalating patient complaint problem, and then decided to reorganize the complaint process by decentralizing it to create "a better level of customer service."

Marsh abolished the PRU and created a new department called the Guest Assistance and Customer Relations department (Guest Assistance). Under this system, the newly formed department received the complaints and forwarded them to the originating department or clinic for a response, while under the old system,

the PRU staff received the complaints, investigated them by contacting the originating department, and then provided the response to the patient.

Marsh asked Alvarado to assist in developing a transition plan for the newly created department, including staffing levels. On December 29th, Alvarado sent a preliminary draft Transition Plan to Duruisseau setting forth the proposed staffing for the new department.

After Marsh discussed the matter with Alvarado and Chason, it was decided Susan Summers should be given the position of manager of the Guest Assistance department. At the time, Summers was Marsh's executive assistant. With a classification of Analyst V, she handled the day-to-day management of Marsh's office and supervised two clerical staff. She also had duties involving human resources, special projects, and the budget.

Summers no longer worked in the director's office, although she continued to report to Marsh because the newly created department reported to her rather than to Ross and Duruisseau. Ross was upset because she lost her supervisory authority over that unit, believing it reflected poorly on her ability to manage.

With the reorganization, all permanent employees in the PRU faced lay-off. Although there were eight employees, only three full time employees faced layoff, Armstrong, Kerss, and Smith-

Frederick.³ On January 10, 2000, Ross and Sonia Salcedo of Employee and Labor Relations met with those employees and informed them of the reorganization and the creation of the Guest Assistance department. They were advised that three full time positions were available in the new department with classifications of Assistant II, Assistant III, and Analyst II, and that they could each apply for any of those positions by submitting a letter of interest.

As an Analyst III Supervisor, Armstrong was qualified for all three positions, although all three were lower classifications than hers. However, she was advised that if she applied for the Analyst II position, she would have been considered for it and her salary would have remained the same because there was an overlap in the salary range between the Analyst II and Analyst III Supervisor levels. Smith-Frederick, an Assistant I, and Kerss, an Analyst II, applied for the Assistant II and Analyst II positions respectively and were appointed to those respective positions, resulting in a promotion for Smith-Frederick.

³ While there were eight employees in that unit (three were African-American, one was Tongan, one was Hispanic, and three were Caucasian), only six of them were permanent employees with layoff rights (two were African-American, one was Hispanic, and three were Caucasian), and three of those six employees were not planning on returning to the unit due to an anticipated retirement, extended medical leave, and a University internship. This left only three permanent employees facing lay-off, Armstrong and Smith-Frederick, both African-American, and Kerss, a Caucasian.

Armstrong did not submit a letter of interest for any of those positions because she did not want to apply for a job she viewed as a demotion and considered it degrading to have to be supervised by a woman she believed was less qualified, less educated, and less experienced in her field than Armstrong.

March announced the creation of the new Guest Assistance department on February 15, 2000. In February 2000, letters of indefinite lay-off proposals were sent to Armstrong and the other two non-retired employees who did not submit letters of interest in the positions in the new department. The letters advised that their respective positions would be eliminated effective March 31, 2000.

D. Events Following the Reorganization

Meanwhile, on January 18, 2000, prior to the reorganization, Armstrong met with Salcedo and told her she had some preliminary discussions with Kim Barnett, the manager of the Dermatology Department, about creating a position for her in that department. As a result, Salcedo worked with Barnett and Annie Ngo, the manager of the Urology Department, to create a position that would assist Armstrong in developing skills and knowledge for her continued employment with the University.

On February 3rd, the University and Armstrong reached a Training and Development Agreement whereby Armstrong continued to receive the same rate of pay, remained in her same classification, and divided her time primarily between the Departments of Dermatology and Urology. The training agreement,

by its terms, terminated on March 31, 2000.

Armstrong began working in the Dermatology Department on January 10th, under Barnett's supervision and got along well with her. Armstrong found the work interesting and performed so well that Dr. Peter Lynch, the Chairman of the Dermatology Department, obtained an extension of the agreement until October 2000, and after March 31st, Armstrong worked full time in that department.

About two months later, on June 8th, Armstrong submitted a letter of resignation to Barnett informing her she had accepted a position outside of the University and that her last day of work would be June 16, 2000.

E. The Pleadings and Motions for Summary Judgment

Armstrong filed suit against the University and Ross, alleging, (1) wrongful termination in violation of public policy (§ 1278.5; Gov. Code, § 12940 [FEHA]), (2) race discrimination under FEHA on a disparate treatment theory, (3) retaliation in violation of FEHA and section 1278.5, (4) failure to prevent racial employment discrimination, (5) intentional infliction of emotional distress, and (6) negligent infliction of emotional distress. All six causes of action were alleged against the Regents, while only the third, fifth and sixth causes of action were alleged against Ross.

Defendants filed separate motions for summary judgment;

Armstrong opposed them in part⁴ and requested leave to amend her pleadings to allege race discrimination on a disparate impact theory. The court granted both motions on all causes of action and impliedly denied the request to amend the pleadings.

Armstrong now appeals from the summary judgment entered in favor of the University and Ross.

DISCUSSION

I.

There Are No Triable Issues of Fact

Armstrong contends the trial court erred in granting summary judgment because she raised triable issues of fact sufficient to sustain her causes of action for wrongful termination and race discrimination. Respondent contends the judgment should be affirmed because the trial court's findings are supported by substantial evidence.

While we agree the trial court properly granted summary judgment, we disagree with respondents' analysis because the substantial evidence standard of review is inapplicable in reviewing summary judgment.

A. Standard of Review

The purpose of summary judgment is to allow the courts "to cut through the parties' pleadings in order to determine

⁴ Armstrong conceded summary judgment on her claims for negligent and intentional infliction of emotional distress alleged in the fifth and sixth causes of action and failed to oppose the motions on the FEHA retaliation claim asserted in her third cause of action.

whether, despite their allegations, trial is in fact necessary to resolve their dispute.” (*Aquilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) The moving party “bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. . . . There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” (*Id.* at p. 850, fns. omitted.) To prevail on a motion for summary judgment, a moving defendant must establish as a matter of law that one or more elements of a cause of action cannot be established or that there is a complete defense. (*Id.* at pp. 849-850.)

We review de novo an order granting summary judgment, viewing the evidence in the light most favorable to the nonmoving party. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768; *Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1001.) In determining whether there is a triable issue of material fact, we consider all the evidence set forth by the parties except that to which objections have been made and properly sustained. (Code Civ. Proc., § 437c, subd. (c); *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334 (*Guz*).) We accept as true the facts supported by plaintiff’s evidence and the reasonable inferences therefrom (*Sada v. Robert F. Kennedy Medical Center* (1997) 56

Cal.App.4th 138, 148), resolving evidentiary doubts or ambiguities in plaintiff's favor. (*Saelzler v. Advanced Group 400*, *supra*, 25 Cal.4th at p. 768.)

B. Wrongful Discharge

Armstrong first contends she demonstrated a violation of fundamental public policy and presented evidence raising a triable issue of fact on the issue of constructive termination. As to the latter contention, she lists eight points detailing how her relationship with Ross deteriorated when she began reporting her unit was "out of compliance" and that Ross's hostility culminated in the reorganization of the PRU, which was targeted at her for the purpose of disrupting her position, duties, and reputation at the University.⁵ The University contends there is no causal link between Armstrong's complaints and the decision to reorganize her unit.

Like the trial court, we find Armstrong has failed to raise a triable issue of fact that she was constructively discharged because at the time of her resignation, her working conditions

⁵ More specifically, Armstrong claims Ross became increasingly hostile, ordering her to stop using the phrase "out of compliance," that she ostracized her, criticized her, blamed her for the Patient Relation Unit's problems, and punished her by restricting her external activities and giving her a downgraded performance evaluation, which resulted in a smaller pay increase; Ross made defamatory remarks that Armstrong was a problem employee who was hard to get along with, which poisoned her professional reputation; and Ross adopted a plan to reorganize the Patient Relations Unit in order to disrupt Armstrong's position, duties, and reputation at the University.

were not unusually intolerable so as to compel her to quit her job. In light of our holding, we need not address the question whether the University's actions violated fundamental public policy.

The wrongful discharge of an employee in violation of fundamental public policy gives rise to a tort action for damages by the discharged employee. (*Turner v. Anheuser-Bush, Inc.* (1994) 7 Cal.4th 1238, 1252 (*Turner*); *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 178.) A wrongful discharge may occur not only when the employer formally discharges the employee, but also when "the employer's conduct effectively forces an employee to resign." (*Turner, supra*, at p. 1244.) In this circumstance, the discharge is characterized as a constructive discharge and is treated as the "practical and legal equivalent of a dismissal" (*Id.* at p. 1248.)

To prove a tort claim of wrongful constructive discharge in violation of public policy, the employee must prove (1) she held a position of employment, (2) there was a constructive discharge, (3) the discharge was for an unlawful purpose, and (4) the purpose violated fundamental public policy, such as where the employee is discharged for reporting a violation of a statute or regulation. (*Turner, supra*, 7 Cal.4th at pp. 1251-1252; *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 79-80.)

To prove a constructive discharge, the evidence must show "the employer either intentionally created or knowingly

permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign," (*Turner, supra*, 7 Cal.4th at p. 1251.) The test for determining whether a constructive discharge occurred is an objective one, "'whether a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit.'" (*Turner, supra*, 7 Cal.4th at p. 1248, quoting *Rochlis v. Walt Disney Co.* (1993) 19 Cal.App.4th 201, 212, overruled on other grounds in *Turner, supra*, at p. 1251.)

The conditions must be "unusually 'aggravated' or amount to a 'continuous pattern' before the situation will be deemed intolerable. In general, '[s]ingle, trivial, or isolated acts of [misconduct] are insufficient' to support a constructive discharge claim. [Citation.] Moreover, a poor performance rating or a demotion, even when accompanied by reduction in pay, does not by itself trigger a constructive discharge." (*Turner, supra*, 7 Cal.4th at p. 1247, fns. omitted.) "'In order to properly manage its business, every employer must on occasion review, criticize, demote, transfer, and discipline employees.'" (*Id.* at p. 1255, quoting *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148, 160.)

Applying these principles, we conclude Armstrong has failed to establish a triable issue of fact that she was constructively

discharged because the evidence and the reasonable inferences that may be derived from it show that her resignation was a voluntary and strategic choice rather than one compelled by intolerable working conditions. (*Turner, supra*, 7 Cal.4th at p. 1255.)

It is undisputed that by the time Armstrong submitted her letter of resignation in June 2000, she had not been demoted, as were many other UCDHS employees, and Ross, whose authority over her terminated on January 10, 2000, no longer supervised her. After she decided not to apply for a position in the Guest Assistance department, she reached an agreement with the University, under which she was transferred to a newly created training position. In that position, she was allowed to retain her same salary and classification and initially split her time between the departments of Urology and Dermatology, learning to manage a medical department. Beginning April 1st, she continued in her training position, but worked full time in the Department of Dermatology where she got along well with her new supervisors, found the work interesting, and performed so well, her training program was extended by seven months. Indeed, Armstrong does not even contend her new supervisors treated her poorly and claims no emotional injuries, having conceded her claims for the infliction of emotional distress were without merit. It was under these conditions that she submitted her letter of resignation and accepted a position as manager with Western Health Advantage.

Although Armstrong claims she was unhappy with her training position because it was temporary, foreign, and initially split between two departments, these conditions can hardly be said to raise her working conditions to an intolerable level. The conditions giving rise to her resignation "must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer. The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee. [¶] "An employee may not be unreasonably sensitive to his [or her] working environment Every job has its frustrations, challenges, and disappointments; these inhere in the nature of work. An employee is protected from . . . unreasonably harsh conditions, in excess of those faced by his [or her] co-workers. He [or she] is not, however, guaranteed a working environment free of stress.'" (Turner, *supra*, 7 Cal.4th at pp. 1246-1247, quoting *Goldsmith v. Mayor and City of Baltimore* (4th Cir. 1993) 987 F.2d 1064, 1072.)

Thus, even assuming for the sake of argument that Armstrong's working conditions were intolerable while she was in the PRU under Ross's supervision, her working conditions were no longer unusually intolerable beginning in February 2000, when she began her new training position through June when she resigned.

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does not advance Armstrong's position, despite her steadfast claims to the contrary. While her broad factual allegations may share a few common elements with the facts in *Colores*, the evidence shows that Armstrong's working conditions do not begin to compare with the working conditions suffered by *Colores*, a medically disabled employee who was expressly targeted for harassment and humiliation in order to force her to resign. As discussed, the circumstances shown by Armstrong's evidence are markedly different.

Accordingly, we find the trial court properly granted the University's motion on Armstrong's first cause of action for wrongful discharge.

C. Employment Race Discrimination

Armstrong's second cause of action alleges the University engaged in racial discrimination in its lay-off, investigative, and rehire procedures. On appeal, she contends she produced sufficient evidence to allow a reasonable trier of fact to find in her favor on a disparate treatment theory as well as on a disparate impact theory of discrimination.⁶

⁶ Although Armstrong did not allege disparate impact theory in her first amended complaint, in her opposition to the University's motion for summary judgment, she requested leave to amend her complaint to include that theory. In her reply brief on appeal, she raises for the first time the claim the trial court erred in failing to rule on her request to amend. It is improper for an appellant to raise new points in a reply brief to which the respondent has no opportunity to respond. (*Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1144.) The point therefore will not be considered in the absence of a

The University contends Armstrong failed to establish a prima facie case of racial discrimination and that it presented un rebutted evidence that the decision to reorganize the PRU was based on legitimate business concerns. We agree with the University.

The California Fair Employment Housing Act (FEHA) makes it unlawful for an employer to discriminate against a person on the

showing of good cause. (*Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8.) Because Armstrong has failed to offer good cause for her failure to raise this claim in her opening brief, we decline to consider it.

Moreover, the trial court's Order After Hearing makes clear it did rule on her request, impliedly denying it because Armstrong failed to present sufficient evidence to raise a triable issue of discrimination on that theory. Furthermore, because the interests of justice would not have been served, the trial court did not abuse its discretion in denying the request. (Code Civ. Proc., §§ 473, subd. (a)(1) and 576; *Landis v. Superior Court of Los Angeles* (1965) 232 Cal.App.2d 548, 555; *City of Stanton v. Cox* (1989) 207 Cal.App.3d 1557, 1563.) Armstrong based her request upon the assertion disparate impact evidence had been explored during discovery. However, as the trial court found, her evidence failed as a matter of law to prove that theory. Indeed it did because she failed to present any statistical evidence to support that claim. That omission is a fatal flaw in a disparate impact claim where the focus is generally on statistical disparities rather than the specific incidents and competing explanations for those disparities. (*Watson v. Fort Worth Bank & Trust* (1988) 487 U.S. 977, 987 [101 L. Ed. 2d 827, 840].) In a disparate treatment claim, the plaintiff must prove causation by offering "statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." (*Id.* at p. 994 [at p. 845]; *Rose v. Wells Fargo & Co.* (9th Cir. 1990) 902 F.2d 1417, 1424.) Armstrong made no such showing. Because Armstrong's proof failed as a matter of law, an amendment was unnecessary and would have necessitated reopening the case to allow further discovery on the issue.

basis of her race, in the "terms, conditions, or privileges of employment." (Gov. Code, § 12940, subd. (a).) Discrimination may be proven on a theory of disparate treatment defined as "intentional discrimination against one or more persons on prohibited grounds." (*Guz, supra*, 24 Cal.4th at p. 354, fn. 20.)

Because direct evidence of intentional discrimination is rare, the California courts have adopted the three-part burden-shifting test set forth in *McConnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [36 L.Ed.2d 668], which is applicable at trial. (*Guz, supra*, 24 Cal.4th at pp. 354-355.) By application of this test, "discrimination [may] be inferred from facts that create a reasonable likelihood of bias [that] are not satisfactorily explained." (*Id.* at p. 354.) The first step places the initial burden on the plaintiff to establish a prima facie case of discrimination in order to eliminate the most patently meritless claims. The plaintiff must show "'actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a [prohibited] discriminatory criterion. . . .' [Citation.]" [Citation.]" (*Id.* at pp. 354-355.)

Although the specific elements of a prima facie case vary, the plaintiff must generally establish (1) she was a member of a protected class, (2) she was qualified for the position she sought or was performing competently in the position held, (3)

she suffered an adverse action such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive. If a prima facie case is shown, a rebuttable presumption of discrimination arises. (*Guz, supra*, 24 Cal.4th at p. 355.)

The burden then shifts to the employer to rebut the presumption by producing admissible evidence that raises a genuine issue of fact the "action was taken for a legitimate, nondiscriminatory reason." (*Guz, supra*, 24 Cal.4th at pp. 355-356.) If the employer sustains this burden, the presumption of discrimination disappears. The plaintiff must then present evidence the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or that the employer acted with a discriminatory animus. At trial, the plaintiff bears the ultimate burden of establishing actual discrimination. (*Id.* at p. 356.)

However, the *McDonnell Douglas* formula is not strictly applied in a motion for summary judgment. (See *Guz, supra*, 24 Cal.4th at pp. 356-361.) As stated, summary judgment may be granted only "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) When making this determination, the court must "consider all of the evidence set forth in the papers, except that to which objections have been made and sustained" (*Ibid.*)

In a summary judgment proceeding, once a moving employer has met its burden by presenting competent admissible evidence that the reasons for its actions were "facially unrelated to prohibited bias," the burden shifts to the employee. The employee must then raise a triable issue that the employer's innocent motive is in material dispute, i.e. the evidence as a whole permits an inference that the employer's actual motive was discriminatory. (*Guz, supra*, 24 Cal.4th at pp. 357-358, 361-362.) If no such inference may be drawn, the employer is entitled to summary judgment. (*Id.* at p. 361.)

1. Prima Facie Case

It is undisputed Armstrong is African-American and therefore belongs to a protected class, that she performed her job well as evidenced by her exemplary performance reviews, and while she was not terminated, demoted, nor denied an available position, she lost her supervisory position when her unit was abolished. She asserts the circumstances surrounding the reorganization and abolishment of the PRU suggest discriminatory motive, namely a less educated and experienced Caucasian employee earning more than she did in the same position had replaced her.

We disagree and think this conclusion is based on nothing more than speculation of racial bias. There is no evidence Marsh or the University were biased against Armstrong because of her race or decided to reorganize the PRU and eliminate her position because of her race. Many of the University's

employees were African-American, including Armstrong's supervisors, Duruisseau, Ross, and Barnett. The University gave Armstrong every opportunity to advance through the system from a temporary position as an Assistant I to a permanent professional employee with a classification of Analyst III Supervisor. It honored her in 1997 with an Employee Recognition Award, and after the reorganization, created a new training position for her at her same level of pay and classification so she could continue her employment.

However, even if Armstrong's evidence was sufficient to raise a presumption of discriminatory motive, the University rebutted that presumption by presenting evidence of legitimate business reasons for the reorganization, namely an increasing number of patient complaints during a time of severe budgetary constraints.

2. Legitimate Business Reason

The undisputed evidence and reasonable inferences show that in 1999, when Armstrong began reporting to management that the PRU was out of compliance with the 30-day resolution requirement, the number of complaints being filed by patients had increased by over 40 percent from the previous year. About this same time, the University was experiencing severe budget problems leading Marsh to issue a memo advising that no non-essential overtime would be allowed and no new positions would be added unless they directly impacted patient safety. Processing patient complaints did not fall into that category.

Marsh implemented cost cutting measures, including the elimination of vacant positions. In the second half of 1999, she implemented a number of reorganizations, decreased staffing levels, and eliminated 300 positions throughout the UCDHS system, which resulted in lay-offs.

At the same time, an increasing number of angry and unresolved patient complaints began reaching Marsh's office, leading her to abolish the PRU, decentralize the system, and create a new department which could more efficiently process the increasing number of complaints with a leaner budget and fewer staff.

In sum, the University presented evidence that the reasons for its actions were "facially unrelated to racial bias", namely that the reorganization and abolishment of the PRU were motivated by the increasing number of patient complaints at a time of severe budgetary shortfalls. Armstrong does not dispute these facts and failed to present evidence that Marsh's decision was false, pretextual, or otherwise motivated by racial animus. (*Hersant v. Department of Social Services, supra*, 57 Cal.App.4th at pp. 1004-1005.)

Although she takes issue with the University's stated reasons, she did not present contradictory evidence. For the most part, she merely disagrees with the wisdom of the University's actions in deciding to abolish her unit and appoint Summers as the supervisor of the new department because in Armstrong's view, Summers is less qualified for that position

than she is.

When opposing a motion for summary judgment, "an issue of fact can only be created by a conflict in the evidence. . . . not . . . by speculation or conjecture." (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 807.) To overcome the employer's stated reasons, the employee cannot "simply show the employer's decision was wrong, mistaken, or unwise. Rather, the employee "must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them 'unworthy of credence,' [citation], and hence infer 'that the employer did not act for the [. . . asserted] non-discriminatory reasons.' [Citations.]" [Citations.]" (*Horn v. Cushman & Wakefield Western, Inc.*, *supra*, quoting *Hersant v. Department of Social Services*, *supra*, 57 Cal.App.4th at p. 1005.)

Armstrong points to the indefinite layoff proposal which she received as evidence of inconsistency, pointing out that it only states "abolishment of Patient Relations unit" rather than "budget," as the reason for the layoff. From there, she makes the inferential leap that the budgetary problems were not the true reason for the reorganization and therefore the University's claims to the contrary are false. We disagree. Because the abolishment of the PRU was the immediate and direct reason for her layoff, the layoff notice was not inconsistent

with the University's evidence that the PRU was abolished as a result of system inefficiency and budgetary constraints.

Armstrong also asserts the PRU was the only unit targeted for budget reduction. The undisputed evidence is to the contrary. As stated, many other departments were reorganized and many other positions were eliminated.

Armstrong further asserts the University's budgetary problems and resulting cost cutting measures are belied by the fact Summers, a Caucasian, was paid more than she was when she supervised the PRU. Again we disagree. First, Summers is Hispanic not Caucasian and second, she was classified as an Analyst V Supervisor both before and after the reorganization. Because this classification was higher than Armstrong's, she was paid at a correspondingly higher rate before the reorganization, and like Armstrong, was allowed to keep her same classification and salary after the reorganization. Moreover, after the reorganization, she not only supervised the Guest Assistance department, she also managed the Hospital's VIP program.

More importantly, Summers' qualifications and the wisdom of her appointment are not at issue. (*Guz, supra*, 24 Cal.4th at p. 358; *Hersant v. Department of Social Services, supra*, 57 Cal.App.4th at p. 1005.) The discrimination laws are not vehicles for second-guessing an employer's business decisions in the absence of some evidence of impermissible motive. (*Gonzales v. MetPath, Inc.* (1989) 214 Cal.App.3d 422, 428; *Lucas v. Dover Corp.* (10th Cir. 1988) 857 F.2d 1397, 1403.) Here, there is no

evidence of impermissible motive. As the trial court found, once Marsh made her decision to reorganize the PRU and decentralize the patient complaint process, the results that followed were to be expected, some positions were eliminated, some employees were repositioned and reclassified, and others were laid off. Armstrong was one of the fortunate ones, she was merely repositioned.

In short, there is insufficient evidence to show the University's decision to reorganize the PRU and eliminate Armstrong's position was motivated by her race. Accordingly, we find the trial court properly granted the motion for summary judgment on Armstrong's second cause of action for racial employment discrimination.

II.

Retaliation in Violation of Health & Safety Code Section 1278.5

Armstrong next contends the trial court erred in granting summary judgment on her third cause of action for retaliation in violation of section 1278.5 because a constructive discharge is not a necessary element of a cause of action under that section. She also contends the trial court erred by failing to apply the required rebuttable presumption of retaliation required by section 1278.5, and in finding that the prohibition of that section applies only to health facilities and not to individuals.

We agree with Armstrong that constructive discharge is not an element of her third cause of action for retaliation under

section 1278.5. Nevertheless, we disagree with her other two points of error and therefore find the trial court properly granted summary judgment as to this theory of her complaint.

1. Rebuttable Presumption

Section 1278.5 provides whistleblower protections to an employee of a health facility when that facility discriminates or retaliates in any manner against the employee because he or she presented a grievance or complaint relating to the care, services, or conditions of that facility. (§ 1278.5, subd. (b)(1).)

Subdivision (d) of section 1278.5 provides a rebuttable presumption of retaliation. "Any discriminatory treatment of an employee who has presented a grievance or complaint . . . as specified in subdivision (b), if the health facility had knowledge of the employee's initiation . . . shall raise a *rebuttable presumption* that the discriminatory action was taken by the health facility in retaliation, if the discriminatory action occurs within 120 days of the . . . complaint. For purposes of this section, 'discriminatory treatment of an employee' shall include discharge, demotion, suspension, any other unfavorable changes in the terms or conditions of employment, or the threat of any of these actions." (Italics added.)

This presumption is a "presumption[] affecting the burden of producing evidence as provided in Section 603 of the Evidence Code." (§ 1278.5, subd. (e). "A presumption affecting the

burden of producing evidence is a presumption established to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied." (Evid. Code, § 603.) "The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption." (Evid. Code, § 604.)

As set forth in the margin,⁷ the trial court's statement in its Order After Hearing demonstrates that it properly applied the rebuttable presumption when it concluded Armstrong had failed to raise a triable issue of retaliation in violation of section 1278.5. The court engaged in a three-step burden shifting analysis, first considering Armstrong's evidence of retaliation and then the University's evidence of legitimate

⁷ "[E]ven if the Court were to find that plaintiff had established a triable issue regarding her *prima facie* case, defendant has met its burden of showing a legitimate reason for the actions taken. Defendant was facing budget problems In response to the directive regarding budget problems, Ms. Marsh decided to eliminate the Patient Relations Department and create a new one. . . . Ms. Marsh had only met plaintiff once. . . . Plaintiff has not come forward with competent, admissible evidence, sufficient to create a triable issue, that Ms. Marsh's decision was based on anything plaintiff had done or that Ms. Marsh considered anything other than that needed to address a budget problem."

business reasons. After viewing this evidence, the court found the University had met its burden of proof, and the presumption of retaliation disappeared. (Evid. Code, § 604.) The court next considered Armstrong's evidence and arguments, finding her evidence insufficient to raise a triable issue of fact that the University's stated reasons were false or pretextual. We therefore conclude, the trial court properly applied the rebuttable presumption required by section 1278.5.

2. Claims Against Individuals

Armstrong contends the trial court erred when it found she did not state a cause of action against Ross under section 1278.5 because that section does not provide a civil remedy against an individual. Relying on *Mathews v. Superior Court* (1995) 34 Cal.App.4th 598, Armstrong argues that section 1278.5 does apply to individual defendants because subdivision (f) of that section imposes criminal liability on "[a]ny person"

We disagree with her conclusion because section 1278.5 clearly distinguishes between the liability of a health facility and that of any person, and limits an employee's remedy to a civil suit against the hospital for the "acts of the employer."

Subdivision (b)(1) of section 1278.5 states the prohibition that "[n]o *health facility* shall discriminate or retaliate in any manner against any patient or employee of the health facility because that patient or employee, or any other person, has presented a grievance or complaint, or has initiated or

cooperated in any investigation or proceeding of any governmental entity, relating to the care, services, or conditions of that facility.” (Italics added.)

The civil sanctions for violating this prohibition apply to a “health facility,” which is subject to civil penalties to be assessed and recovered in administrative proceedings. (§ 1278.5, subd. (b)(2).) Misdemeanor penalties may be imposed on “[a]ny person who willfully violates [the] section” (§ 1278.5, subd. (f).)

However, the remedy available to an employee who has been discriminated against under this section is limited to a civil claim for “*reinstatement, reimbursement for lost wages and work benefits caused by the acts of the employer, and the legal costs associated with pursuing the case.*” (§ 1278.5, subd. (g), italics added.) By its term, this provision is inapplicable to an individual because it applies only to acts of the employer and only the employer has the authority to grant the remedy of reinstatement.

Nor does *Mathews v. Superior Court, supra*, 34 Cal.App.4th 598, advance Armstrong’s position. There the court held that a civil claim against an individual may be brought under FEHA (Gov. Code, § 12940) because the language of FEHA specifically applies to individuals. (*Id.* at pp. 602-606.) By contrast, section 1278.5 only provides a civil claim against a health facility.

We therefore find section 1278.5 does not apply to an

individual and that the trial court properly concluded Armstrong failed to state a cause of action against Ross under that section.

DISPOSITION

The judgment is affirmed. The Regents of the University of California are awarded their costs on appeal. (Cal. Rules of Court, rule 27(a)(1).)

BLEASE, J.

We concur:

SCOTLAND, P. J.

SIMS, J.